85-2048

Supreme Court, U.S.
FILED
JUN 11 1986
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1985

JACK LYNN HOFFART,

Petitioner,

vs.

THE STATE OF TEXAS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FOURTEENTH SUPREME JUDICIAL DISTRICT OF TEXAS

PETITION FOR A WRIT OF CERTIORARI

RICHARD W. SCHMUDE
P.O. Box 674
Tomball, Texas 77375
(713) 656-4674
Attorney of Record for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

QUESTIONS PRESENTED

1. Whether, in a trial for criminal trespass of an abortion clinic (the information alleging both entering with notice that entry was forbidden and remaining after receiving notice to depart), Petitioner's U.S. constitutional rights to compulsory process, to a fair trial and not to be deprived of liberty without due process of law were violated when the Trial Court, after a hearing, refused to require the abortion clinic to furnish Petitioner with the names, addresses and telephone numbers (if available) of the women who were inside the clinic's waiting room at the time of Petitioner's arrest in such room while he was addressing them and others on the subject of abortion;

2. Whether, during retrial of the case, the Trial Court's granting of the State's motion to dismiss the second paragraph of the information (alleging that Petitioner remained after receiving notice to depart) operated to eliminate Petitioner's need for the testimony of such women and to make their testimony irrelevant, where Petitioner had advised the Trial Court previously that the evidence was needed in support of a number of (justification) defenses as well as the defense of denial and for certain impeachment purposes.

3. Whether *Roe v. Wade*, 410 U.S. 113 (1973), is void as violative of the U.S. Constitution and laws and of fundamental principles of personal jurisdiction (*Roe* being attacked collaterally in a special jury instruction submitted on the defense of third person under Texas statutory law which the Trial Court refused to give); and

4. Whether this Court should reconsider and overrule *Roe v. Wade* in light of:

- the existence of important consequences of *Roe* which were unintended by this Court;
- the existence of important factual errors or omissions in *Roe*;
- the absence of personal jurisdiction in *Roe* over (a) Children who survive abortions only to die as a direct or indirect result thereof and (b) Unborn Children threatened and endangered with death by abortion; and
- the existence of procedural and substantive constitutional errors in *Roe*.

TABLE OF CONTENTS

Pages

QUESTIONS PRESENTED i

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES vi

OPINION BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 3

A. The West Loop Clinic, Inc. 4

B. Off-duty Houston Police Officers Employed by the Clinic 4

C. Petitioner's Entry of the Clinic and Arrest 5

D. Quest for Witnesses in the Waiting Room of the Clinic 6

1. Motion To Compel Production and Ruling 6

2. Motion To Reconsider, etc. and Ruling 8

E. Defenses Raised at the Trial 9

F. Federal Questions 9

ARGUMENT:

I. PETITIONER'S U.S. CONSTITUTIONAL RIGHTS TO COMPULSORY PROCESS, TO A FAIR TRIAL AND NOT TO BE DEPRIVED OF LIBERTY WITHOUT DUE PROCESS OF LAW WERE VIOLATED BY THE TRIAL COURT'S REFUSAL TO REQUIRE THE CLINIC TO PRODUCE, BEFORE TRIAL, IDENTIFICATION INFORMATION AS TO CERTAIN WOMEN WITH FIRST-HAND INFORMATION NEEDED BY PETITIONER AT THE TRIAL 10

TABLE OF CONTENTS—Continued

Pages

II. PETITIONER WAS ENTITLED TO HAVE THE JURY INSTRUCTED ON THE DEFENSE OF THIRD PERSON (THE UNBORN) UNDER TEXAS LAW, WITH THE "UNLAWFUL FORCE" ELEMENT POSTURED UNDER THE TEXAS ANTI-ABORTION LAW BEFORE THIS COURT IN *ROE V. WADE* BECAUSE *ROE* IS VOID AND SUCH ANTI-ABORTION LAW IS STILL IN EFFECT 13

A. Background 13

B. The Merits 15

1. No Representation 17

2. No Personal Jurisdiction 17

3. Invidious Discriminations 18

4. Failure To Apply Pre-existing Supreme Court Decisions Concerning Human Personhood Under the 14th Amendment 18

5. Failure To Apply the Constitutional Implied Rights Concept to 14th Amendment Personhood for the Unborn 19

6. Failure To Apply Properly the Constitutional Implied Rights Concept to "Liberty" Under the 14th Amendment 19

7. Naked Deprivation of Rights 20

8. Manufacture of the Right of Abortion, Etc. 20

III. THIS COURT SHOULD RECONSIDER AND OVERRULE *ROE V. WADE* 21

A. *Roe* Has Produced Various Unintended Consequences 21

TABLE OF CONTENTS—Continued

Pages

1. Abortion on Demand 21
2. Effect of Abortion and the Abortion "Ethic" on Children Who "Survive" Abortion 22
3. Internal Legal Chaos 22

B. Important Factual or Other Errors Were Made by the Court in *Roe* 23

1. Erroneous Consideration of Texas as a Party 23
2. Erroneous Purpose Ascribed to State Anti-abortion Statutes in Late 19th and Early 20th Centuries 24
3. Unfair Portrayal of the Common Law, as Expounded by Coke, Concerning Abortion 25
4. The Erroneous Implication that Only a Minority of U.S. Jurisdictions Treated the Abortion of a "Quick" Unborn Child as a Crime 27
5. Erroneous Claim as to When the States Began Generally To Replace the Common Law with Legislation 29
6. Erroneous Use of Maternal Mortality Rates 29

CONCLUSION 30

APPENDIX ..... App. 1

TABLE OF AUTHORITIES

Pages

I. U.S. Cases:

Bowlan v. Lunsford, 54 P. 2d 666 (S.C. Okla., 1936) 25

Bradley v. Henry, 239 S.W. 2d 404 (Tex. Civ. App.—Fort Worth, 1951), no writ 16

Brantley v. Boone, 34 S.W. 2d 409 (Tex. Civ. App.—Eastland, 1931), no writ 16

Brown v. Board of Education of Topeka, 347 U.S. 483 (1954) 15

Burnet v. Coronado Oil & Gas Co., 285 U.S. 393 (1932) (Dissenting Opinion of Justice Brandeis) 21

Chambers v. Mississippi, 410 U.S. 284 (1973) 11

Commonwealth v. Parker, 50 Mass. 263 (S.J. Ct. Mass., March Term, 1845) 28

Crisfield v. Storr, 36 Md. 129 (Ct. App. Md., 1872) 23

Dietrich v. Inhabitants of Northampton, 138 Mass. 14 (S.J. Ct. Mass., 1884) 25

Doe v. Bolton, 410 U.S. 179 (1973) 21, 22

Dougherty v. People, 1 Colo. 514 (S.C. Colo., 1872) 25

Edwards v. State, 112 N.W. 611 (S.C. Neb., 1907) 25

Erie R. Co. v. Tompkins, 304 U.S. 64 (1938) 15, 20, 21

Ex parte Young, 209 U.S. 123 (1908) 24

Gay v. Baker, 58 N.C. 344 (S.C.N.C., 1860) 22

Glona v. American Guarantee and Liab. Ins. Co., 391 U.S. 73 (1968) 19

TABLE OF AUTHORITIES—Continued

	Pages
Gray v. State, 178 S.W. 337 (Tex. Crim. App., 1915)	28
Griswold v. Connecticut, 381 U.S. 479 (1965)	19
Hans v. Louisiana, 134 U.S. 1 (1889)	23
Johnson v. Zerbst, 304 U.S. 458 (1938)	15
Levy v. Louisiana, 391 U.S. 68 (1968)	19
Marbury v. Madison, 5 U.S. 137 (1803)	20
McArthur v. Scott, 113 U.S. 340 (1885)	17, 18
Mills v. The Commonwealth, 13 Pa. St. 630 (S.C. Pa., 1850)	28
Mitchell v. Commonwealth, 78 Ky. 204 (Ct. App. Ky., Sept. Term, 1879)	28
Munk v. Frink, 116 N.W. 525 (S.C. Neb., 1908)	28
Munn v. Illinois, 94 U.S. 113 (O.T., 1886)	20
Nash v. Meyer, 31 P. 2d 273 (S.C. Idaho, 1934)	25
Ogas v. Texas, 655 S.W. 2d 322 (Tex. App.—Amarillo, 1983), no writ	16
Pennoyer v. Neff, 95 U.S. 714 (1878)	17
Plessy v. Ferguson, 167 U.S. 537 (1896)	15
Roe v. Wade, 410 U.S. 113 (1973)	*passim*
Roe v. Wade, Separate Opinions: Burger, C.J. (Concurring), 410 U.S. 208 Rehnquist, J. (Dissenting), 410 U.S. at fn. 1, 175-176	29
Showery v. State, 690 S.W. 2d 689 (Tex. App.—El Paso, 1985)	22
Smith v. State, 33 Me. 48 (S.C. Me., 1851)	28

TABLE OF AUTHORITIES—Continued

	Pages
State v. Alcorn, 64 P. 1014 (S.C. Idaho, 1901)	28
State v. Ausplund, 167 P. 1019 (S.C. Ore., 1917)	25
State v. Cooper, 22 N.J.L. 52 (S.C.N.J., 1849)	28
State v. Cox, 84 P. 2d 357 (S.C. Wash., 1938)	25
State v. Gedicke, 43 N.J.L. 86 (S.C.N.J., Feb. Term, 1881)	25
State v. Howard, 32 Vt. 380 (S.C. Vt., 1859)	25
State v. Miller, 133 P. 878 (S.C. Kan., 1913)	25
State v. Murphy, 27 N.J.L. 112 (S.C.N.J., 1858)	24, 25
State v. Reed, 45 Ark. 333 (S.C. Ark., 1883)	28
State v. Slagle, 82 N.C. 566 and 83 N.C. 544 (S.C.N.C., 1880)	28
State v. Stafford, 123 N.W. 167 (S.C. Iowa, 1909)	28
State v. Steadman, 51 N.E. 91 (S.C.S.C., 1948)	28
State v. Tippie, 105 N.E. 75 (S.C. Ohio, 1913)	25
State v. Watson, 1 P. 770 (S.C. Kan., 1883)	25
Sterling v. Constantin, 287 U.S. 378 (1932)	24
Stills v. Gratton, 127 Cal. Reptr. 652 (Cal. App., 1st, 1976)	22
Swift v. Tyson, 16 Pet. 1 (1842)	15, 21
The Ladies Center of Clearwater Inc. v. Reno, 341 S. 2d 543 (Fla. App. 2d, 1977)	22
United States v. Nixon, 418 U.S. 683 (1974)	11
Washington v. Texas, 338 U.S. 14 (1967)	11
Windsor v. McVeigh, 93 U.S. 274 (1876)	15
Yandell v. Delgado, 471 S.W. 2d 569 (S.C. Tex., 1971)	16

TABLE OF AUTHORITIES—Continued

Pages

II. English Cases:

Beale v. Beale, 24 E. Repts. 373 (Ch., 1713) 26, 27

Burdet v. Hopegood, 24 E. Repts. 484 (Ch. 1718) 26

Millar v. Turner, 27 E. Repts. 907 (Ch., 1747-1748) 26

Select Pleas of the Crown AD 1200-1225 (Selden Society, 1887):

Case No. 82 (1200), p. 39 26

Case No. 26 (1202), p. 11 26

Case No. 73 (1203), p. 32 26

III. U. S. Constitution, Statutes and Federal Rule of Civil Procedure:

U.S. Constitution:

Article III 2, 20

Article VI 2, 19, 20

5th Amendment 2, 12, 17, 18, 20

6th Amendment 2, 13

9th Amendment 2, 20

10th Amendment 2, 20

11th Amendment 23

14th Amendment 2, 13, 18, 19

U.S. Statutes:

Social Security Act:

Subchapter II, 42 U.S.C. 401 *et seq.* 20

Subchapter IV, 42 U.S.C. 601 *et seq.* 20

28 U.S.C. 1257(3) 1

TABLE OF AUTHORITIES—Continued

Pages

FEDERAL RULE OF CIVIL PROCEDURE:

Rule 19 17

IV. TEXAS STATUTES:

TEX. FAMILY CODE:

§ 15.021 16

TEX. PENAL CODE:

§ 1.05(b) 16

§ 9.33 ..... 13, 14, 16

§ 30.05 3

VERNON'S TEX. CIV. STATS.:

art. 5429b-2, Code Construction Act, Sec. 2.01 16

art. 4512.5 16

V. TREATISES AND TEXTBOOKS:

Blackstone, *Commentaries on the Laws of England*

Vol. I (c. 1765), pp. 129-130 27

Vol. IV (c. 1769), p. 198 27

Boke of Justyces of Peas (1506?, 1515, 1521 and 1544) 26

III Chitty, *A Practical Treatise on the Criminal Law* (London, 1816), pp. 798-801 ..... 26, 27

Clark, *Handbook of Criminal Law* (3rd ed.) (1915), pp. 24, 25 26

3 Coke, *Inst.* 50-51 26

I East, *A Treatise of the Pleas of the Crown* (Phil., 1806), ch. V, p. 227 27

TABLE OF AUTHORITIES—Continued

Pages

Flanagan, *The First Nine Months of Life* (N.Y., 1962), Preface, p. 9 30

II Hale, *The History of the Pleas of the Crown* (1st Am. ed., with notes, etc. by Stokes and Ingersoll) (Phil., 1847), p. 563 27

1 Hawkins, *A Treatise of the Pleas of the Crown* (c. 1716) (Curwood, London, 1824), ch. 13, pp. 94-95 27

Lader, *Abortion* (1966), pp. 78-79 25

Means, "The Phoenix of Abortional Freedom", etc., 17 *N.Y.L.F.* 335 (1971) 25

Nathanson, *Aborting America* (N.Y., 1979), pp. 55, 155 and 174 (Means) and pp. 29-36, 47-71, 82, 85, 116, 148-157, 163, 168, 172 and 307 (Lader) 25

New Perspectives on Human Abortion (ed. by Hilgers, Horan and Mall) (Frederick, Md., 1871), ch. 15, p. 199, fn. 2, p. 203 30

1 *Select Justiciary Cases* 1624-1650 (The Stair Society, Edinburgh, 1953), p. 81 26

Star Chamber Cases (Soule and Bugbee) (Boston, 1881), reprinted from the edition of 1630 or 1641, pp. 19-20 26

Webster's Third New International Dictionary of the English Language, Unabridged (G & C Merriam Co., Springfield, Mass.) (1971), pp. 388 and 1686 16

I Wood, *An Institute of the Laws of England* (3rd ed., Holborn, Eng.) (1724), ch. 1, p. 11 27

TABLE OF AUTHORITIES—Continued

Pages

VI. MISCELLANEOUS:

Former *Tex. Penal Code* art. 1191 14

Lord Ellenborough's Act (1803) 26

Preamble to Lord Ellenborough's Act (1803) 26, 27

Record, *Roe v. Wade*, p. 109 23

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. 1-9) is reported at 686 S.W. 2d 259.

———o———

JURISDICTION

The Judgment of the Court of Appeals was dated and entered on January 17, 1985 (Pet. App. 1, 9). A timely Motion for Rehearing was overruled by that Court on February 7, 1985. On February 26, 1986, the Court of Criminal Appeals of Texas refused Petitioner's Petition for Discretionary Review (Pet. App. 9-10). A timely Motion for Rehearing was denied by that Court on April 16, 1986 (Pet. App. 9-10). The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

———o———

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. CONSTITUTION:

Article III:

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their authority; * * *.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the supreme Court shall have or-

iginal Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

Article VI, Second Paragraph:

This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

5the Amendment:

* * * [N]or shall any person * * * be deprived of life, liberty, or property, without due process of law; * * *.

6th Amendment:

In all criminal prosecutions, the accused shall enjoy the right * * * to have cumpulsory process for obtaining witnesses in his favor * * *.

9th Amendment:

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

10th Amendment:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

14th Amendment:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof,

> are citizens of the United States and of the State wherein they reside. * * * [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

———o———

STATEMENT OF THE CASE

By Criminal Information filed in Criminal Court at Law No. 10 of Harris County, Texas ("Trial Court"), Petitioner was charged with criminal trespass of a certain building in Harris County, Texas, allegedly by entering such building with notice that entry was forbidden (1st paragraph) and by remaining in the building after receiving notice to depart (2nd paragraph), in violation of *Tex. Penal Code,* § 30.05 (R. I—3). The building in question was the West Loop Clinic, which is an abortuary (R. II—6).

The case was tried to a 6-person Jury in April, 1984. However, the Jury was unable to agree on a verdict (deadlocked 3:3), and the Trial Court declared a mistrial.

During retrial of the case before another Jury in May, 1984, the Trial Court dismissed the second paragraph of the Information on motion by the Respondent (R. IV—70-71). Subsequently, the Jury found Petitioner guilty as charged (1st paragraph), and fixed punishment at a fine of $500.00 and confinement in jail for 30 days, but recommended probation only for the jail time (R. VI—13). The Trial Court sentenced Petitioner in accordance therewith, fixing the probation at 6 months and with two special conditions, namely, that he performs 50 hours of community service and that he not enter upon the premises of any

establishment the outside of which he was picketing peacefully.

The pertinent facts are these:

A. *The West Loop Clinic, Inc.* The West Loop Clinic, Inc. ("Clinic") is a for-profit business corporation which performs pregnancy-related services, including abortions. It leases space inside a one-story building and 19 parking places in an adjoining parking lot. The building faces a frontage road and public sidewalk which run parallel to Interstate 610 South in Houston, Texas. Several other persons or entities lease or occupy space in such building.

The Clinic includes a large waiting room which is open to the public with restrictions—people who have business with the Clinic. However, the restrictions were not posted on Saturday, February 4, 1984, when Petitioner was arrested. About 20 abortions were performed at the Clinic on that date. The Clinic advertised its services in the "Bell System Yellow Pages," through the "TV Chronilog" of "The Houston Chronicle" Newspaper and possibly over a Spanish-speaking radio station (R. III—42; R. V—84).

On Saturdays from about mid-1983 to February 4, 1984, Petitioner and others conducted outside picketing, distribution of literature and/or counseling activities in the area of the Clinic.

B. *Off-duty Houston Police Officers Employed by the Clinic.* The Clinic hired City of Houston Police Officers to work there (off-duty). Officer Sam Piccolo, who had worked at the Clinic for about 1½ or 2 years, said that

his "duties" there were those of a "police officer," and he liked to think of himself as a police officer there, more than just a security officer (R. IV—33). While in uniform, including badge and gun, Officer Piccolo issued numerous warnings to Petitioner and others not to go on the grass or the parking lot, not to go on the premises and to stay on the sidewalk (R. IV—45-46, 60-61; R. V—7, 17-18, 62). The Clinic's lease, however, did not cover the grass between the sidewalk and the building, and covered only some of the parking lot (R. IV—45-46, 88; R. V—7, 17-18). On one occasion, an unidentified Houston Police Officer working for the Clinic ordered the Petitioner, who was on the public sidewalk in front of the Clinic, to leave the area (R. V—66, 68-71).

C. *Petitioner's Entry of the Clinic and Arrest.* On February 4, 1984, which was a Saturday, Petitioner arrived at the Clinic (area) around 8 a.m. He did sidewalk counseling to about 11 a.m., during which he distributed literature and talked or attempted to talk to people who were entering the Clinic (R. V—7-8). However, he was alone at first and was not able to talk or hand out literature to all of the women (*Id.*, 21). He saw women enter the Clinic that morning, but was able to talk to only a few of them (*Id.*, 8, 28). Later that morning, he was joined by three others. About 10:30 a.m., Evicel Ortego, who worked for the Clinic, told Petitioner not to come into the building or to stay on the sidewalk (R. III—22) and, in Defendant's Bill of Exceptions No. 2, said that she "probably" made that statement (R. IV—23). The incident and her testimony were disputed.

At about 11 a.m., Petitioner entered the Clinic and went direct to the waiting room where there were about

30-40 people, mainly women (R. V—20, 23). He began to speak to the group in an elevated voice, desiring to be heard (*Id.*, 23-24). The group became hushed (*Id.*, 24). He said, in effect, that there was really no call to have an abortion, that there were alternatives and that he could help (*Id.*, 23). He spoke for less than 10 seconds when Officer Piccolo arrested him (*Id.*, 25).

Petitioner entered the Clinic in order to talk to the women who had appointments for abortions, to offer them alternatives (to abortion) and to prevent the killing of their unborn children (R. V—20-21, 59). He knew abortions were being performed at the Clinic that day (*Id.*, 28-29), and felt he was needed inside "to help save babies" (*Id.*, 21, 36). It was "most necessary" for him to enter in order to "prevent the killing of another human being" (R. V—29). His interest in such children was that (*Id.*, 30):

> They're creatures of God, created in his image. And they have rights to live. They have a birth right like we did. And [it] is unjust to kill an innocent human being.

He was compelled to enter by love and kindness toward the women and to save the unborn (*Id.*, 36, 59). It was necessary for him to do so because he had been unable to distribute literature or talk to most of the women who had entered the Clinic (*Id.*, 21, 60).

D. *Quest for Witnesses in the Waiting Room of the Clinic.* 1. *Motion To Compel Production and Ruling.* Before the first trial, Petitioner filed a motion to compel the Clinic to produce, before trial, the names, addresses and telephone numbers (if available) of the females who were in the Clinic's waiting room at the time Petitioner was arrested there (R. I—10-12). The motion alleged, in

part, that these data were important to Petitioner's defense of the charges against him, and that they were required for usage before trial in order to perfect Petitioner's constitutional rights to compulsory process. A subpoena dueces tecum seeking such data was filed and served on the Clinic.

On February 28, 1984, a pre-trial hearing was conducted on the motion. Petitioner testified, in part, that, in his opinion, the women who were in the waiting room could help him in his defense, that he felt he needed them in order to testify concerning his "right of free speech," as to "why" he and they came to the Clinic, and that he "wasn't told to leave once [he] entered" (R. II—18). Petitioner's Counsel informed the Court that Petitioner was relying on five defenses, three of which he specified—free speech and expression, necessity and defense of others (the unborn)—and argued that the testimony was needed as to these defenses, as well as the denial defense on the "notice to depart" element of the second count of the Criminal Information (R. II—20, 21, 23, 25, 26).

The Court denied the motion, stating that the women "might suffer severe psychological affects (sic) if called without a compelling need being shown" by Petitioner, and that it had "not heard a compelling need for their testimony" (R. II—26). The Court instructed Counsel for Respondent to provide Petitioner's Counsel "any and all material that they have in their posesssion or have access to which would be exculpatory and that would tend to negate the charge" (*Ibid.*). Petitioner's Counsel said, in part, that he would have no objection to the women testifying under assumed names and wearing facial masks if they so desired (R. II—27-28).

2. *Motion to Reconsider, etc. and Ruling.* Before the second trial (the first trial having ended in a mistrial), Petitioner filed a motion to reconsider and overrule the above ruling, to order the Clinic to produce the data at issue and to postpone the retrial of the cause (R. I—29-32). The motion alleged that the witnesses were in a position to perceive Petitioner's entry into the waiting room, the manner in which he entered, what he said or did there, the manner in which he acted, including the tone of his voice, what Officer Piccolo said prior to arresting him in the waiting room, whether Officer Piccolo had warned him to depart the building, the arrest, the reaction of the people in the waiting room to the arrest there and how the waiting room was being used by the persons inside it; that many of the witnesses in the waiting room were waiting their turns for abortions and presumably destroyed their unborn children by abortion on February 4, 1984; and that evidence on these subject areas was "important and material to Defendant's defenses to the criminal charges, namely, his defenses of denial, necessity, defense of another, defense of life and health and free speech" (R. I—30).

A brief hearing was conducted before commencement of the second trial, during which Petitioner's Counsel advised the Court that the evidence sought was needed in connection with various defenses (free speech, necessity, defense of others and denial) and in order to contradict certain testimony of Officer Piccolo (R. III—3-4). Counsel was willing to have the evidence developed by deposition in a private office setting or taken in some type of an assmued name or facial mask context (R. III—3). The motion was denied. During the second trial, the Court dismissed the second paragraph of the Criminal Information on motion by the Respondent (R. IV—70-71).

E. *Defenses Raised at the Trial.* At the trial, Petitioner raised and introduced evidence on nine defenses to the charges: Denial, Free Speech (United States and Texas Constitution), Necessity, Defense of Third Person (4 aspects), Protection of Life or Health and Mistake of Fact. Special instructions on these defenses were presented to the Trial Court (R. I—38-50). The Court refused to instruct the Jury on such defenses, leaving Petitioner only with the defense of denial before the Jury.

F. *Federal Questions.* Before the Trial Court, Petitioner (1) moved to compel production of the witness data before trial and (2) introduced evidence on the defense of another (the Unborn) and submitted a special instruction on such defense which constituted a collateral attack on *Roe v. Wade,* 410 U.S. 113 (1973). The Trial Court denied the motion to compel, adhering to its prior ruling on the same subject, i.e., that the women "might suffer severe psychological affects (sic) if called without a compelling need being shown", and Petitioner had not shown a "compelling need" for their testimony (R. III—3-4; see R. II—26). It declined respectfully to grant the special instruction at issue (as well as others).

These rulings (and many others) were raised as points of error on appeal. The Court of Appeals upheld the denial of the motion to compel because the Trial Court dismissed the second paragraph of the Information, thereby eliminating the "notice to depart" requirement and making the testimony of the women "irrelevant." It upheld the Trial Court's refusal to give the special instruction on the ground that it was not supported by the evidence. Subsequently, it overruled Petitioner's Motion for

Rehearing which raised such points as grounds for rehearing.

These holdings (and others) were challenged in Petitioner's Petition for Discretionary Review to the Texas Court of Criminal Appeals. That Court, however, refused said Petition, and denied subsequently Petitioner's Motion for Rehearing which raised such errors as grounds for rehearing.

———o———

ARGUMENT

I.

Petitioner's U.S. Constitutional Rights To Compulsory Process, To A Fair Trial And Not To Be Deprived Of Liberty Without Due Process Of Law Were Violated By The Trial Court's Refusal To Require The Clinic To Furnish, Before Trial, Identification Information As To Certain Women With First-Hand Information Needed By Petitioner At The Trial.

The Court of Appeals ruled that Petitioner did not need the names, addresses and telephone numbers (if available) of the women at issue because the second paragraph of the Criminal Information was dropped (during the second trial). It said that "[t]he requirement of 'receiving notice to depart' was eliminated and, therefore, the testimony of the people in the waiting room became irrelevant" (Pet. App. 3). This was rank constitutional error.

Not only did the Court of Appeals overlook the plain fact that Petitioner's constitutional rights to the information were violated *long before* the State, during the second trial, moved to dismiss the second paragraph of the In-

formation, but that Petitioner *needed* the evidence (1) in support of his justification defenses of necessity, defense of another and free speech and (2) for certain impeachment purposes.[1] Petitioner pressed these needs before the Trial Court and the Court of Appeals. "Few rights are more fundamental than that of an accused to present evidence in his own defense." *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973). See *Washington v. Texas*, 388 U.S. 14 (1967), where this Court said, in part (at p. 19):

> *The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense,* the right to present the defendant's version of the facts as well as the prosecution's to the jury so that *it* may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, *he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.* (Emphasis added.)

Further, in the interest of an accused's rights to compulsory process and to due process, a court should do all that it can do reasonably to assure the production of all relevant evidence at trial. As this Court put it in *United States v. Nixon*, 418 U.S. 683, 711 (1974):

> The right to the production of all evidence at a criminal trial similarly has constitutional dimensions. The Sixth Amendment explicitly confers upon every defendant in a criminal trial the right "to be confronted with the witnesses against him" and "to have

---

[1] Officer Piccolo and Petitioner differed as to the elevation of Petitioner's voice and as to the reaction of the people in the waiting room to Petitioner's arrest there.

> compulsory process for obtaining witnesses in his favor." Moreover, the Fifth Amendment also guarantees that no person shall be deprived of liberty without due process of law. *It is the manifest duty of the courts to vindicate those guarantees, and to accomplish that it is essential that all relevant and admissible evidence be produced.* (Emphasis added.)

Moreover, the ruling of the Court of Appeals at issue is *incongruous* with its later ruling, on *other* points of error, upholding the Trial Court's refusal to instruct the Jury on certain defenses (including necessity and defense of third person) and on certain statutory forms of notice for criminal trespass because the "rejected defenses and instructions were *not raised by the evidence*" (Pet. App. 8). (Emphasis added.) Petitioner submits respectfully that the Court of Appeals *cannot* have it both ways—to uphold the denial of Petitioner's motion without addressing the full range of needs expressed for the evidence, yet sustaining the Trial Court's rejection of defensive instructions because of a lack of supportive evidence. Indeed, the evidence which Petitioner sought might have convinced the Court of the existence of such defensive issues (there being, in any event, no question on the record of this case that *all* such defenses were supported by the evidence).

That the action of the Trial Court, upheld on appeal, operated to deny Petitioner access to eyewitness evidence needed by him at the trial is not open to question.[2] The

---

[2] Petitioner needed this information so that the affected females might be interviewed for purposes of testifying (voluntarily or under compulsion) in connection with certain of Petitioner's justification defenses and for certain impeachment pur-

(Continued on following page)

Trial Court's "compelling need" standard (which Petitioner met in any event) and its concern for possible severe psychological effects[3] upon the women if called to testify *were overriden* by Petitioner's 6th Amendment rights to compulsory process and to a fair trial and by his 14th Amendment right that the State of Texas, acting through its Judiciary, not deprive Petitioner of his liberty to such data without due process of law. This error should have been corrected by the Court of Appeals.

II.

Petitioner Was Entiled To Have The Jury Instructed On The Defense Of Third Person (The Unborn) Under Texas Law, With The "Unlawful Force" Element Postured Under The Texas Anti-Abortion Law Before This Court In Roe v. Wade Because Roe Is Void And Such Anti-Abortion Law Is Still In Effect.

A. *Background.* At the trial, Petitioner relied upon a number of justification defenses, including the defense of third person. The defense of third person is set forth in *Tex. Penal Code*, § 9.33, which reads as follows:

> A person is justified in using force or deadly force against another to protect a third person if:

(Continued from previous page)

poses. In addition, they could have corroborated Petitioner's testimony in certain respects, i.e., his conduct in the waiting room, and could have blunted the prosecutor's argument to the all woman jury, particularly during the punishment phase of the trial, that Petitioner harassed the women, that he tried to hurt them, that he tried to inflict guilt upon them, that he tried to make them feel sorrow and that he tried to punish them (R. V—64-65; R. VI—8-10).

[3] Petitioner was willing to allow the affected persons to testify under assumed names, to wear facial masks if they desired and later to give depositions in a private office setting, with their depositions to be read to the Jury (R. III—3).

> (1) under the circumstances as the actor reasonably believes them to be, the actor would be justified under Section 9.31 or 9.32 of this code in using force or deadly force to protect himself against the *unlawful force* or unlawful deadly force he reasonably believes to be threatening the third person he seeks to protect, and
>
> (2) the actor reasonably believes that his intervention is immediately necessary to protect the third person. (Emphasis added.)

The evidence showed, in part, that abortions were being performed at the Clinic on the date of Petitioner's arrest; that Petitioner was aware of that situation; that he had talked to only a few of the women who entered the Clinic that morning; that he entered the Clinic, proceeded to the waiting room and addressed the people inside; and that he entered the Clinic in order to talk to the women who had appointments for abortions in order to offer them alternatives and to prevent the killing of their unborn children. See Statement of the Case, *supra.*

Toward the end of the evidentiary phase of the trial, Petitioner submitted four special instructions concerning the defense of third person, including three that involved *Roe v. Wade,* 410 U.S. 113 (1973). Under one Special Instruction, the "unlawful force" element of *Tex. Penal Code,* § 9.33 was postured under Texas anti-abortion law before the Court in *Roe* (former *Tex. Penal Code* art. 1191)[4] and constituted a collateral attack on *Roe.* After paraphrasing the provisions of said section 9.33 and defining the term "unlawful," the Special Instruction provided, in pertinent part (R. I—45):

---

[4] For the text of said article 1191, see *Roe,* 410 U.S. at fn. 1, p. 117.

> You are instruced further that it is unlawful for any person in this State to administer designedly to a pregnant woman or knowingly procure to be administered with her consent any drug or medicine, or shall use toward her any violence or means whatever externally or internally applied to procure thereby an abortion except where abortion is procured or attempted by medical advice for the purpose of saving the life of the mother. By "abortion" is meant that the life of the fetus or embryo shall be destroyed in the woman's womb or that a premature birth thereof be caused.

The Court respectfully denied this as well as other Special Instructions submitted (R. V—57).

This ruling was upheld on appeal. The Court of Appeals ruled that Petitioner was not entitled to this (as well as certain other instructions) because, in its view, the issue was not raised by the evidence.

B. *The Merits.* At the threshold, it is well established that if a court in the United States violates the U.S. Constitution in a proceeding before it, *it loses jurisdiction to proceed to judgment,* and any "judgment" which it might enter would be *void.* E.g., *Johnson v. Zerbst,* 304 U.S. 458, 467-468 (1938); *Windsor v. McVeigh,* 93 U.S. 274, 277-284 (1876). This Court is capable of violating the U.S. Constitution. See *Erie R. Co. v. Tompkins,* 304 U.S. 64, 77-78, 79-80 (1938), where the Court even *admitted* that it and lower federal courts had done so with application of the doctrine of *Swift v. Tyson,* 16 Pet. 1 (1842). Compare, for example, the U.S. constitutional teachings of *Plessy v. Ferguson,* 167 U.S. 537 (1896), with those of *Brown v. Board of Education of Topeka,* 347 U.S. 483 (1954).

The "unlawful force" element of such Special Instruction, postured under Texas anti-abortion statutory law

before the Court in *Roe*, was evident because *Roe* is void as violative of the U.S. Constitution and laws and as violative of fundamental principles of personal jurisdiction. Accordingly, such anti-abortion law is still in effect. The Unborn Children[5] who Petitioner sought to save by entering the Clinic were being subjected to unlawful abortional killing in violation of such law.

---

[5] An Unborn Child is a "third person" within the meaning of *Tex. Penal Code*, § 9.33. The noun, "third person," is not defined in the *Texas Penal Code*. Accordingly, resort is to be made to common usage or understanding to define same. See *Tex. Penal Code*, § 1.05(b); Code Construction Act, *Vernon's Tex. Civ. Stats.* art. 5429b-2, Sec. 2.01; *Webster's Third New International Dictionary of the English Language Unabridged* (G & C Merriam Co., Springfield, Mass.) (1971), pp. 1686 ("person" as an "individual human being") and 388 ("child" as an "unborn or recently born human being"). This squares with legal reality in Texas where, for example, it is a felony to destroy the life of an unborn child during parturition of the mother where the child is capable of being born alive (*Vernon's Tex. Civ. Stats.* art. 4512.5); a suit affecting the parent child relationship may be brought after the first trimester of pregnancy (*Tex. Family Code*, § 15.021); an unborn child is protected against tortious injury at all stages of gestation [*Yandell v. Delgado*, 471 S.W.2d 569, 570 (S.C. Tex., 1971)]; an unborn child may take an award for the wrongful death of his father under the Wrongful Death Act [*Brantley v. Boone*, 34 S.W.2d 409, 411 (Tex. Civ. App.—Eastland, 1931), no writ]; and unborn children may be represented in judicial proceedings where their property rights are affected [*Bradley v. Henry*, 239 S.W.2d 404 (Tex. Civ. App.—Fort Worth, 1951), no writ].

Ogas v. Texas, 655 S.W.2d 322 (Tex. App.—Amarillo, 1983), no writ, which held that an unborn child was not a third person under said Section 9.33 is not correct. The Court reached that conclusion by applying the code definition of the nouns "person" and "individual." This was incorrect since the noun which required application was "third person." Since this noun is not defined in the *Texas Penal Code*, resort to common usage and understanding was required by Section 1.05(b) of said Code and the Code Construction Act, above.

Roe is void on the following constitutional or jurisdictional bases:

1. *No Representation.* Neither Abortion "Survivor" Children nor Unborn Children threatened and endangered by abortion were represented before the U.S. District Court or this Court in *Roe.* Abortion "Survivor" Children born in this country are U.S. Citizens (with extremely minor exceptions), yet they are doomed to die and die primarily due to prematurity, abortional injury or lack of care. Unborn Children, with well recognized legal postures under the laws of the United States, Texas and other States, are killed outright by abortion. Abortion "Survivors" and Unborn Children are persons or entities with legal personalities under the due process clause of the 5th Amendment to the U.S. Constitution. The Judgments of the U.S. District Court and this Court in *Roe,* rendered without any representation of such Victims by guardian or next friend (or by counsel for such guardian or next friend), constituted naked deprivation of life, liberty and property without due process of law, in violation of such 5th Amendment. Accordingly, such Judgments are unconstitutional and void as to them. See U.S. Const., 5th Amendment (due process); *McArthur v. Scott,* 113 U.S. 340, 391-392, 404 (1885) (Unborn Children); *Pennoyer v. Neff,* 95 U.S. 714, 733-734 (1878) (U.S. Citizens); Rule 19, *F.R. Civ. Proc.*

2. *No Personal Jurisdiction.* Neither the U.S. District Court nor this Court had personal jurisdiction over such Abortion "Survivor" or Unborn Children in *Roe.* Yet each such category of Children was affected vitally by those proceedings, and had a right to be before the Courts

through next friends or guardians. The Judgments of such Courts, therefore, were unconstitutional and void as to them. *Ibid.*

Moreover, this deficiency operated to divest the U.S. District Court and this Court of authority to pronounce judgment affecting them personally. The Unborn Children who were conceived and killed by abortion after *Roe* could not be affected jurisdictionally by *Roe* in their rights posture, yet they die from *Roe*. See *McArthur v. Scott, supra,* 113 U.S. at 391-392, 404. The Judgments of such Courts, rendered without personal jurisdiction over the Infant Victims of abortion, are void as violative of fundamental principles of personal jurisdiction.

3. *Invidious Discriminations.* The discriminations perpetrated in *Roe* against Abortion "Survivors" and Unborn Children as compared to the nonaborted born and corporations are invidious. For example, corporations, which are artificial beings and not mentioned in the U.S. Constitution, are "persons" under the due process and equal protection clauses of the 14th Amendment thereof, while actual unborn human beings, recognized in law and possessive of substantial legally cognizable rights, are denied such personhood. A prematurely born child of 7-month gestational age has 14th Amendment personhood while an older and more developed Unborn Child of 8-months gestational age does not. Neither the 5th nor the 14th Amendments to the U.S. Constitution can justify such crazy-quilt discriminations.

4. *Failure to Apply Pre-existing Supreme Court Decisions Concerning Human Personhood Under the 14th Amendment.* The Court failed to apply the "live," "hu-

man'' and ''having a being'' test of 14th Amendment personhood postulated by it in *Levy v. Louisiana,* 391 U.S. 68 (1968), and the ''biological'' test of such personhood set forth in *Glona v. American Guarantee and Liab. Ins. Co.,* 391 U.S. 73 (1968), to the affected Unborn Children. If such constitutional interpretive decisions can be overlooked or disregarded, how can it be maintained that a constitutional interpretive decision has ''law of the land'' ranking? See U.S. Const., Art. VI (Supremacy Clause).

5. *Failure To Apply the Constitutional Implied Rights Concept to 14th Amendment Personhood for the Unborn.* Since a born person has 14th Amendment recognition, and since such a person does not originate at birth, it follows that 14th Amendment recognition extends to such person prenatally. The person after birth is the self-same person before birth, only at a different developmental stage. The human genetic code is present at fertilization. The implied rights cases of constitutional stature [e.g., *Griswold v. Connecticut,* 381 U.S. 479 (1965)] were misapplied on the issue of personhood.

6. *Failure To Apply Properly the Constitutional Implied Rights Concept to ''Liberty'' Under the 14th Amendment.* While ''liberty'' is a broad concept, ''life'' is the most basic of rights for, without it, all other rights and interests are meaningless. Where was the correlation between ''liberty'' and the right to destroy unborn life? Or the basis for the ''fundamental'' ranking of such right? Not only was abortion a crime at common law and in Texas and Georgia, but the legal and social heritage of this Nation viewed abortion not as a ''right'' but as a naked wrong. Moreover, the Constitution protects the life

rights of persons against certain governmental deprivations, and *nowhere* does it give any human being the right to destroy the life of another. If the implied rights decisions of this Court were applied properly, the life right of the Unborn would have prevailed clearly over any liberty to destroy the same.

7. *Naked Deprivations of Rights.* The due process clause of the 5th Amendment stood as a bar to this Court's Judgment in *Roe* which endangered the rights of Abortion "Survivors" and authorized the destruction of a large body of legally cognizable rights of the Unborn. See *Marbury v. Madison,* 5 U.S. 137, 163 (1803); *Munn v. Illinois,* 94 U.S. 113, 130 (O.T., 1886).

8. *Manufacture of the Right of Abortion, Etc.* In *Roe,* this Court violated Article III of the U.S. Constitution by creating a constitutional liberty of abortion and by restricting the states of *their* reserved constitutional authorities to legislate in this area of substantial state interest. This also violated the unenumerated rights of the people, as guaranteed by the 9th Amendment to the U.S. Constitution, and the Division of Powers Concept, as guaranteed by the 10th Amendment to such Constitution. See *Erie R. Co. v. Tompkins, supra,* 304 U.S. at 77-78, 79-80. Finally, the Court violated the supremacy clause of Article VI by authorizing the destruction of rights cognizable under federal statutory law (e.g., insurance and ADC benefits under the Social Security Act, Subchapters II and IV, 42 U.S.C. 401 *et seq.*, and 42 U.S.C. 601 *et seq.*, respectively).

III.

This Court Should Reconsider And Overrule Roe v. Wade.

The collateral attack on *Roe v. Wade, supra,* 410 U.S. 113, set forth in Section II of the Argument, above, looks to an overruling of *Roe.* Reconsideration and overruling of *Roe* should be undertaken for additional reasons set forth below. See *Erie R. Co. v. Tompkins, supra,* 304 U.S. 64, overruling *Swift v. Tyson,* 16 Pet. 1 (1842); *Burnet v. Coronado Oil & Gas Co.,* 285 U.S. 393, 406-408 (1932) (Dissenting Opinion of Justice Brandeis).

A. *Roe Has Produced Various Unintended Consequences. Roe* has produced consequences or results which this Court did not intend:

1. *Abortion on Demand.* In *Roe,* this Court made it clear that a pregnant woman does not have an absolute right to terminate her pregnancy "at whatever time, in whatever way, and for whatever reason she alone chooses" (410 U.S. at 153). The Constitution does not require "abortion on demand" (410 U.S. 208, Burger, C.J., Concurring Opinion). In *Doe v. Bolton,* 410 U.S. 179 (1973), the Court said that "*Roe v. Wade, supra,* sets forth our conclusion that a pregnant woman does not have an absolute constitutional right to an abortion on her demand" (410 U.S. at 189). The opposite, as the Court may well take note, has occurred and continues. Well over one million Unborn Children are killed by abortion in this Nation each year. Abortion "Survivor" Children, who are U.S. Citizens, also die from abortion or its "ethic." In Texas, killing by abortion is "wide open" from conception to the commencement of childbirth. Even where a state pro-

scribes abortion after viability, with life and health exceptions per *Roe,* the "health" meaning under *Doe* is so broad as to make such proscription more form than substance.

2. *Effect of Abortion and the Abortion "Ethic" on Children Who "Survive" Abortion.* Abortions and applications of the abortion "ethic" bring about deaths of U.S. Citizen Children who continue to live *after* they have been aborted. These Children die primarily as a result of prematurity, abortional injury or lack of care. Sometimes they are killed outright. See, e.g., *Showery v. State,* 690 S.W. 2d 689 (Tex. App.—El Paso, 1985). Moreover, since "unsuccessful" abortions (i.e., those resulting in live births) could translate into legal claims against the abortionists, etc., "success" is encouraged legally—to the naked detriment of Infant U.S. Citizens. *Stills v. Gratton,* 127 Cal. Reptr. 652, 657, 658-659 (Cal. App., 1st, 1976); see *The Ladies Center of Clearwater Inc. v. Reno,* 341 So. 2d 543 (Fla. App. 2d, 1977).

3. *Internal Legal Chaos. Roe* has introduced legal chaos in Texas and other domestic U.S. Jurisdictions relative to Unborn Children. They have substantial legal recognitions and rights, yet they may be killed by abortion. Under Texas law, for example, an Unborn Child has legal rights of representation, protection against prenatal torts, and rights under property law. In a majority of U.S. Jurisdictions, a *stillborn child* who had reached the viability stage (or earlier, as in George and Rhode Island) is a "person," etc. under their respective wrongful death or kindred statutes. Certain property interests may vest in an Unborn Child [*Gay v. Baker,* 58 N.C. 344, 345, 346 (S.C.

N.C., 1860) (trust); *Chrisfield v. Storr*, 36 Md. 129, 145-146 (Ct. App. Md., 1872) (remainder in real property)]. A "duty of care" is owed to the Unborn Child under the prenatal tort injury doctrine, as recognized in all 51 domestic U.S. Jurisdictions. How can the "law" recognize a legal status and provide for or recognize legal rights in an Unborn Child when *Roe* authorizes such Child to be destroyed by abortion on demand? Should the existence and protecability of legally cognizable rights be made to depend upon the whim or desire of the one who seeks to destroy the same?

B. *Important Factual or Other Errors Were Made by the Court in Roe.* The Court made a number of factual or other errors in *Roe*, most of which influenced improperly the Court's main holdings:

1. *Erroneous Consideration of Texas as a Party.* In several places, the Court indicated that Texas was before the Court or was a party to the proceedings (410 U.S. at 116, n. 54 at 157, 159 and 162). This made it *appear* that a more full and fair proceeding was conducted.

Not only was Texas not a party (e.g., Record, *Roe v. Wade*, p. 109) but it could not have been a party because there would have been no constitutional jurisdiction in the U.S. District Court to entertain such a case. It is well established that federal judicial authority, as circumscribed by the 11th Amendment to the U.S. Constitution, does *not* extend to a suit brought against a state in a U.S. District Court by a citizen(s) of that state *unless*, of course, the state consents to such a suit. *Hans v. Louisiana*, 134 U.S. 1, 9, 10-15 (1889) (leading case). The Plaintiffs in *Roe* were Citizens of Texas; they sued Henry Wade, Dis-

trict Attorney for Dallas County, Texas, in a U.S. District Court; and the State of Texas had not consented to such a suit.

On the other hands, it is settled that an action brought in a U.S. District Court against a state officer, challenging the constitutionality of a State statute or seeking to enjoin its enforcement on constitutional grounds, as in *Roe*, is not a suit against the State, and is not prohibited under the doctrine of sovereign immunity. *Ex parte Young*, 209 U.S. 123, 159-160 (1908); *Sterling v. Constantin*, 287 U.S. 378, 393 (1932). It is treated as against the officer alone, and *Roe* was such a case.

2. *Erroneous Purpose Ascribed to State Anti-abortion Statutes in Late 19th and Early 20th Centuries.* As for the "original purpose" of state anti-abortion statutes, the Court said that "The few state courts called upon to interpret their laws in the late 19th and early 20th centuries did focus on the State's interest in protecting the woman's health rather than in preserving the embryo and fetus" (410 U.S. at 151). It cited *State v. Murphy*, 27 N.J.L. 112, 114 (S.C.N.J., 1858), as an example authority for such statement. This statement and its context made it *appear* that the statutes were outdated purpose-wise, maternal health being protected by medical advances in the interim, and enhanced unfairly the Court's liberty to abort holding.

The fact of the matter is that, in the late 19th and early 20th centuries, state courts made it quite clear that the purposes or objects of their anti-abortion statutes were to protect or safeguard *either* the Unborn Child *or*

the mother *and* the Unborn Child.[6] The Court's reliance on *Murphy* was poor because the Supreme Court of New Jersey pointed out *subsequently* that the statute which the *Murphy Court* construed "was further extended March 26th, 1872 * * * *to protect the life of the child* * * *." *State v. Gedicke*, 43 N.J.L. 86, 90 (S.C.N.J., Feb. Term, 1881). (Emphasis Added.) Moreover, *Murphy* appears to stand alone, *not* as an example of authority for the Court's statement.

3. *Unfair Portrayal of the Common Law, as Expounded by Coke, Concerning Abortion.* The Court provided an *unfair picture* of the Common Law as to abortion by referencing Cyril Means, Jr. ["The Phoenix of Abortional Freedom", etc., 17 *N.Y.L.F.* 335 (1971)] and Lawrence Lader [*Abortion* (1966), pp. 78-79] each of whom was active in the movement for the repeal of the abortion laws. See Nathanson, *Aborting America* (N.Y. 1979), pp. 55, 154 and 174 (Means), and pp. 29-36, 47-71, 82, 85, 116, 148-157, 163, 168, 172 and 307 (Lader). Means

---

[6] *State v. Howard*, 32 Vt. 380, 399 (S.C. Vt., 1859) (Mother and Child); *Dougherty v. People*, 1 Colo. 514, 523 (S.C. Colo., 1872) (Mother and Child); *State v. Gedicke*, 43 N.J.L. 86, 89-90 (S.C.N.J., Feb. Term, 1881) (Mother and Child); *State v. Watson*, 1 P. 770, 771, 772 (S.C. Kan., 1883) (Child); *Dietrich v. Inhabitants of Northampton*, 138 Mass. 14, 17 (S.J. Ct. Mass., 1884) (Child) (dictum in tort case); *Edwards v. State*, 112 N.W. 611, 613 (S.C. Neb., 1907) (Mother and Child); *State v. Miller*, 133 P. 878, 879 (S.C. Kan., 1913) (Mother and Child); *State v. Tippie*, 105 N.E. 75, 77 (S.C. Ohio, 1913) (Mother and Child); *State v. Ausplund*, 167 P. 1019, 1022-1023 (S.C. Ore., 1917) (Mother and Child); *Nash v. Meyer*, 31 P.2d 273, 276 (S.C. Idaho, 1934) (Child); *Bowlan v. Lunsford*, 54 P. 2d 666, 668 (S.C. Okla., 1936) (Child); and *State v. Cox*, 84 P. 2d 357, 361 (S.C. Wash., 1938) (Mother and Child).

was especially critical of Coke's statements concerning abortion.[7]

The Court should have examined Coke's abortion statements (3 *Inst.* 50-51) in light of (1) the common law precedents, beginning with the abortion cases during the reign of King John, (2) the nature of a common law crime, i.e., "acts injurious to the public morals" or "acts which are mala in se" [*Clark, Handbook of Criminal Law* (3rd ed.) (1915), pp. 24, 25], and (3) how Coke was treated in this regard by English Courts and Legal Scholars.

In this latter regard, the Court of Chancery, in describing the rights of Unborn Children, said that the destruction of an Unborn Child was "murder" [*Millar v. Turner*, 27 E. Repts. 907, 908 (Ch., 1747-1748) (preceded by a reference to 3 Coke, *Inst.* 50)], and referred to the live birth murder rule described by Coke [*Beale v. Beale*, 24 E. Repts. 373 (Ch., 1713) and *Burdet v. Hopegood*, 24

---

[7] The chief problem with the Means article is lack of depth. He apparently was unaware of substantial English authorities on the subject of abortion. The earliest reported abortion case in post-conquest England was in the year 1200. Other early cases appeared in the years 1202, 1203, 1206 and 1221. E.g., *Select Pleas of the Crown AD 1200-1225* (Selden Society, 1887), Case Nos. 82 (1200), 26 (1202) and 73 (1203), pp. 39, 11 and 32, respectively. The four editions of *Boke of Justyces of Peas* (1506?, 1515, 1521 and 1544) contain an indictment which charged, *inter alia*, the felonious slaying of an unborn child. An interesting conviction for abortion occurred in the Court of Star Chamber during the reign of Elizabeth I. *Star Chamber Cases* (Soule and Bugbee) (Boston, 1881), reprinted from the edition of 1630 or 1641, pp. 19-20. Abortion remained an offense up to the enactment of Lord Ellenborough's Act in 1803, where abortion was first made a statutory offense in England. See III Chitty, *A Practical Treatise on the Criminal Law* (London, 1816), pp. 798-801. Abortion was also an offense in Scotland. See I *Select Justiciary Cases 1624-1650* (The Stair Society, Edinburgh, 1953), p. 81.

E. Repts. 484 (Ch., 1718) citing the *Beale* case]. While Sir Matthew Hale, who was Chief Justice of the King's Bench from 1671-1676, disagreed with the live birth murder rule, he agreed that it was a "great misprison" if a woman quick with child took or another gave her "a potion to cause abortion," or if one struck her "whereby [the] child within her is killed * * *." II Hale, *The History of the Pleas of the Crown* (1st Am. ed., with notes, etc. by Stokes and Ingersoll) (Phil., 1847), p. 563. The writings of William Hawkins, Thomas Wood, William Blackstone and Edward East were consistent with Coke's live birth murder and abortion statements. 1 Hawkins, *A Treatise of the Pleas of the Crown* (c. 1716) (Curwood, London, 1824), ch. 13, pp. 94-95; I Wood, *An Institute of the Laws of England* (3rd ed., Holborn, Eng.) (1724), ch. 1, p. 11; I Blackstone, *Commentaries on the Laws of England* (c. 1765), pp. 129-130; IV Blackstone, *Commentaries on the Laws of England* (c. 1769), p. 198; I East, *A Treatise of the Pleas of the Crown* (Phil., 1806), ch. V, p. 227. Even the Preamble to Lord Ellenborough's Act referred to abortion and other acts as "heinous Offenses," and an indictment was returned for the offense of abortion shortly before enactment in 1803 of that Act. III Chitty, *supra, A Practical Treatise on the Criminal Law*, pp. 798-801.

4. *The Erroneous Implication that Only a Minority of U.S. Jurisdictions Treated the Abortion of a "Quick" Unborn Child as a Crime.* The Court said that "[t]his is of some importance [the alleged contradiction of Coke and the claim that abortion after quickening was never established as a common law crime] because while most American Courts ruled, in holding or dictum, that abor-

tion of an unquickened fetus was not criminal under their received common law, others followed Coke in stating that abortion of a quick fetus was a 'misprison,' a term they translated to mean 'misdemeanor' " (410 U.S. at 135). This made it *appear* that only a *minority* of U.S. Jurisdictions treated the abortion of a "quick" Unborn Child as a crime, and *buttressed unfairly* the Court's conclusion as to the "far freer" prevailing abortion practices in the major part of the 19th century (410 U.S. at 158).

The fact of the matter is that where the woman was "quick with child," *all* courts which considered the question (to Petitioner's knowledge) said that abortion was a crime, etc. at common law. E.g., *State v. Steadman,* 51 S.E. 2d 91, 93 (S.C.S.C., 1948); *Commonwealth v. Parker,* 50 Mass. 263, 266 (S.J. Ct. Mass., March Term, 1845); *Smith v. State,* 33 Me. 48, 55, 57 (S.C. Me. 1851); *State v. Alcorn,* 64 P. 1014, 1016 (S.C. Idaho, 1901); *State v. Cooper,* 22 N.J.L. 52, 58 (S.C.N.J., 1849); *Mitchell v. Commonwealth,* 78 Ky. 204, 210 (Ct. App. Ky., Sept. Term, 1879); *State v. Stafford,* 123 N.W. 167, 168 (S.C. Iowa, 1909); see *Gray v. State,* 178 S.W. 337, 338 (Tex. Crim. App., 1915). Where the woman was not "quick with child," *most* courts which considered the question said that abortion was not an offense at that stage of pregnancy. However, a *respectable minority* of U.S. courts concluded that it was an offense to abort at any stage of pregnancy. *Mills v. The Commonwealth,* 13 Pa. St. 630, 632-633 (S.C. Pa., 1850); *State v. Slagle,* 82 N.C. 566, 567-568, and 83 N.C. 544, 545 (S.C.N.C., 1880); *State v. Reed,* 45 Ark. 333, 334-336 (S.C. Ark., 1883); *Munk v. Frink,* 116 N.W. 525, 527 (S.C. Neb., 1908).

5. *Erroneous Claim as to When the States Began Generally To Replace the Common Law with Legislation.* The Court said that "It was not until after the war between the States that legislation began generally to replace the common law" (410 U.S. at 139). This made it *appear* that State anti-abortion legislation was a latter-19th century development, and it *enhanced unfairly* the Court's "far freer" abortion practice view, above.

The fact of the matter is that, when the War between the States ended (April-May, 1865), there were only 36 States of the United States and, of that number, 27 States had anti-abortion statutes then in effect. See Dissenting Opinion of Justice Rehnquist in *Roe v. Wade,* 410 U.S. at fn. 1, pp. 175-176.

6. *Erroneous Use of Maternal Mortality Rates.* The Court said, "Mortality rates for women undergoing *early abortions,* when the procedure is legal, appears to be as low as or lower than the rates for *normal childbirth*" (410 U.S. at 149; see p. 163). (Emphasis added.) The Court used this (1) to show that the concerns of the States in enacting their anti-abortion statutes of protecting women from a hazardous procedure were no longer valid, and (2) to support the Court's conclusion as to when the State's interest in protecting maternal health became "compelling."

The Court, however, *misused* what it had noticed: The proper mortality comparison was not female deaths from "early abortions" versus female deaths from childbirth because the subjects of comparison were markedly different. Childbirth lasts 3 trimesters; "early abortions" occur in or around the first trimester. The proper proce-

dure would have been to compare the number of maternal deaths resulting from a *specified number of early abortions* with the number of maternal deaths resulting from the same number of *early pregnancies.* The Court's use of the mortality rates, in short, was palpably erroneous and unfair.[8]

CONCLUSION

For the reasons and authorities stated, it is submitted respectfully that the petition for a writ of certiorari should be granted.

Respectfully submitted,

RICHARD W. SCHMUDE
P.O. Box 674
Tomball, Texas 77375
(713) 656-4674

Attorney of Record for Petitioners

June, 1986

---

[8] The Court apparently was unaware of the facts (1) that the concept of human fertilization was not understood until after the discovery of the mammalian ovum (of a dog) in 1827 [Flanagan, *The First Nine Months of Life* (N.Y., 1962), Preface, p. 9], thereby making substantially less significant the failure of the later Common Law to cover abortions before the woman was "quick with child"; and (2) that the first anti-abortion enactment in this country was that of the New York City Common Council of July 27, 1716, which, *inter alia,* prohibited midwives, under penalty of fines or jail terms in default of payment, from giving counsel or administering any "Herb Medicine or Potion, or any other thing to any Woman being with Child whereby She Should *Destroy or Miscarry of that she goeth withall before her time*" [*New Perspectives on Human Abortion* (ed. by Hilgers, Horan and Mall) (Frederick, Md., 1981), ch. 15, p. 199, citing "Minutes of the Common Council of New York" 3 (1712-1729): 121, at fn. 2, p. 203 (Emphasis added.)], thereby showing a serious early concern for the problem of abortion and without reference to any "quick with child" distinction.

APPENDIX

OPINION OF THE COURT OF APPEALS FOR THE FOURTEENTH SUPREME JUDICIAL DISTRICT OF TEXAS
(INCLUDING THE COURT'S JUDGMENT)
(January 17, 1985)

Affirmed and Opinion filed January 17, 1985

JACK LYNN HOFFART, Appellant

B-14-84-361-CR

VS.

THE STATE OF TEXAS, Appellee

Appeal from County Criminal Court At Law No. 10
of Harris County
Cause No. 753,985

O P I N I O N

This is an appeal from the judgment of conviction of the offense of criminal trespass. Appellant, Jack Lynn Hoffart, pled not guilty. The jury found him guilty and assessed his punishment at thirty (30) days in jail, probated for six (6) months, and a fine of $500. We affirm.

Appellant is a member of Life Advocates, an anti-abortion group. For approximately a year, he had picketed outside of clinics which performed abortions. On February 4, 1984, appellant was picketing outside the West Loop Clinic, a private women's clinic which performed abortions, among other services. Appellant had picketed

outside the West Loop Clinic on several occasions. Several employees of the clinic testified that they told appellant not to protest inside the building, although appellant denies being warned.

Evicel Ortega, the clinic administrator, testified that on the day of appellant's arrest, February 4, 1984, a patient complained to her that appellant was upsetting her. Ortega asked appellant, who was at the clinic door, not to come in the clinic. She testified that appellant left and went back to his usual pacing on the public sidewalk. Ortega stated that appellant later came into the waiting area of the clinic with a sign and began talking and motioning. Officer Piccolo, who worked an extra job at the clinic as a security officer and who previously told appellant on other occasions not to enter the building, arrested him for criminal trespass.

Appellant brings twenty-three (23) grounds of error on appeal. We will handle them within four broad categories: (1) pre-trial motions, (2) trial, (3) jury instructions, and (4) sentencing.

I. PRE-TRIAL MOTIONS

Three grounds of error complain of the way the court handled the pre-trial motions. In ground of error one appellant asserts that the trial court erred when it denied his pre-trial motion to compel the clinic to produce the names, addresses, and telephone numbers of all females who were in the clinic's waiting room when appellant entered the clinic. He claims those witnesses were needed to support his denial and justification defenses. His second ground of error states that the trial court erred when

it denied appellant's motion to reconsider. We do not think that appellant presents any error in either ground. Originally the information read:

> Jack Lynn Hoffart, hereafter styled the Defendant, heretofore on or about February 4, 1984, did then and there unlawfully and with notice that entry was forbidden, intentionally and knowingly enter and remain in a building owned by Carol Kofalt, hereafter styled the Complainant, without the effective consent of the Complainant.
>
> It is further presented that in Harris County, Texas, Jack Lynn Hoffart, hereafter styled the Defendant, heretofore on or about, February 4, 1984, did then and there unlawfully intentionally and knowingly enter and, after receiving notice to depart, remain in a building owned by Carol Kofalt, hereafter styled the Complainant, without the effective consent of the Complainant.

The State, in mid-trial, moved to dismiss the second paragraph of the information and the judge charged the jury as follows:

> . . . if you believe from the evidence beyond a reasonable doubt that the Defendant, JACK LYNN HOFFART, did, in Harris County, Texas, on or about the 4th day of February, 1984, with notice that entry was forbidden, intentionally or knowingly enter or remain in a building owned by CAROL KOFALT, without the effective consent of CAROL KOFALT, you will find the defendant guilty.

Since the second paragraph of the information was dropped, appellant did not need the names of the women in the waiting room. The requirement of "receiving notice to depart" was eliminated and, therefore, the testimony of the people in the waiting room became irrelevant.

Ground of error twelve also complains of a pre-trial error. He argues that the trial court erred in denying his pre-trial motion to dismiss the information because the criminal trespass statute was unconstitutionally applied in his case. He alleges that it infringed upon his constitutional right to free speech. We disagree. The clinic was justified in excluding appellant from its property. A privately run clinic is not a public forum for First Amendment purposes. The Supreme Court noted in *Central Hardware Co. v. NCRB* (sic), 407 U.S. 539, 547 (1972):

> Before an owner of private property can be subjected to the commands of the First and Fourteenth Amendments the privately owned property must assume to some significant degree the functional attributes of public property devoted to public use. The First and Fourteenth Amendments are limitations on state action, not on action by the owner of private property used only for private purposes. The only fact relied upon for the argument that Central's parking lots have acquired the characteristics of a public municipal facility is that they are "open to the public." Such an argument could be made with respect to almost every retail and scervice establishment in the country, regardless of size or location. To accept it would cut *Logan Valley* entirely away from its roots in *Marsh*. It would also constitute an unwarranted infringement of long-settled rights of private property protected by the Fifth and Fourteenth Amendments.

The clinic has more aspects of private property than public property. Appellant's right to free speech was not infringed on and the criminal trespass statute was not unconstitutionally applied to him. Ground of error twelve has no merit.

II. TRIAL ERROR

Appellant brings eight grounds of error asserting trial error. His thirteenth ground alleges that the trial court erred in refusing to allow appellant to introduce medical evidence at trial. The evidence concerned, among other things, the point at which human life begins, development characteristics of the unborn child, and the effects of an abortion upon the unborn child. Appellant claims that such evidence was relevant and material to his justification defenses. He also claims that the evidence would corroborate a portion of appellant's testimony at trial. In his fourteenth point of error, appellant argues that the trial court erred in sustaining the State's objection to a question posed to three witnesses (two witnesses at the clinic and a clinic employee) on abortion activities at the clinic. Again, appellant claims that such evidence was material to appellant's defenses and would corroborate portions of appellant's testimony. He also asserts that such evidence would show bias by some clinic employees who testified against appellant. The excluded material, we hold, was irrelevant to this criminal trespass case. We will handle the matter of his defenses later.

Grounds of error sixteen and twenty allege error because the trial court excluded from evidence examples of the clinic's advertisements (from a TV newspaper supplement and the yellow pages) and a copy of the clinic's lease. Those issues are merely conclusory statements without elaboration or authority. Appellant has failed to cite any authority to support his position. As such, they fail to comply with TEX. CODE CRIM. PRO. ANN. art. 40.09, § 9 (Vernon Supp. 1984), and preserve nothing for review.

Phillips v. State, 511 S.W.2d 22, 25-26 (Tex. Crim. App. 1974) and *Daniel v. State,* 486 S.W.2d 944, 948 (Tex. Crim. App. 1972), *cert. denied,* 410 U.S. 958 (1973).

Appellant's seventeenth ground of error alleges that the trial court erred in denying appellant's motion for a directed verdict of not guilty or a judgment of acquittal because the evidence was insufficient to support a verdict of guilty. Appellant has failed to preserve this point adequately by failing to cite additional authority. *Phillips, supra; Daniel, supra.* Even if the question were properly preserved, there would be no error.

Appellant's challenge to the sufficiency of the evidence ignores the fact that on appeal, the sufficiency of the evidence is to be viewed in the light most favorable to the verdict. "The jurors are the exclusive judges of the facts, the credibility of the witnesses, and the weight to be given their testimony. A jury is entitled to accept one version of the facts and reject another or reject any of a witness' testimony." *Penagraph v. State,* 623 S.W.2d 341, 343 (Tex. Crim. App. 1981). When viewed in this light, the evidence was more than sufficient to sustain conviction.

The eighteenth ground of error claims that the trial court erred in overruling appellant's trial objection to the State's question, addressed to appellant, as to the goal of the Life Advocates. Appellant claims that the court's error made it appear that the Life Advocates and appellant were attempting to take away the abortion rights of the all woman jury. Appellant's objection to the question was, "I don't think that's relevant." The objection was properly overruled. The objection was general and pre-

served nothing for review. *Smith v. State*, 513 S.W.2d 823, 829-30 (Tex. Crim. App. 1974).

His fifteenth ground of error alleges that the trial court erred in sustaining the State's objection to appellant's question of a Houston police officer concerning the names and addresses of the witnesses in the clinic's waiting room. He claims that such testimony would show the officer's bias and would impeach the officer, and that the trial court erred in not allowing appellant to develop the testimony. There was no abuse of discretion. *Rovinsky v. State*, 605 S.W.2d 578, 580 (Tex. Crim. App. 1980).

Appellant's ground of error nineteen asserts error because the trial court sustained the State's objection to a question concerning whether appellant felt that the sidewalk area provided adequate space to talk to the women. Appellant argues that the question was designed to elicit relevant and material evidence to appellant's defense of free speech. We find that no error has been preserved. Before appellant could answer, the prosecutor objected and the trial court sustained that objection. Appellant made no bill of exceptions as to what appellant would have said and, therefore, error was not preserved. *Toler v. State*, 546 S.W.2d 290, 295 (Tex. Crim. App. 1977); *Stein v. State*, 514 S.W.2d 927, 930 (Tex. Crim. App. 1974).

III. JURY INSTRUCTIONS

Appellant complains of the jury instructions in eleven (11) grounds of error. Grounds of error number nine and twenty-two assert that the trial court erred in refusing to instruct the jury on the defense of free speech. The requested charge, which is a misstatement of the law, sug-

gests that the jury should interpret the law. The trial court, as we have already discussed, correctly decided that the criminal trespass statute was not unconstitutionally applied to appellant. Appellant was not entitled to a second determination by the jury.

In nine other grounds of error appellant asserts that the trial court committed error in not instructing the jury on the following defenses: defense of third person, defense of protection of life or health, defense of necessity, defense of mistake of fact. Appellant also complains of rejected requests to instruct the jury on other forms of notice. We hold that all of appellant's rejected defenses and instruction were not raised by the evidence and appellant was not entitled to any of the rejected defenses or instructions. *Brooks v. State*, 642 S.W.2d 791, 799 (Tex. Crim. App. 1982).

IV. SENTENCING

Appellant in his last ground of error complains of the court's sentencing. The court required as a condition of probation that appellant "not enter upon the premises of any establishment that you are picketing the outside of." He alleges that the conditions of appellant's probation placed a prior restraint on appellant's exercise of his United States and Texas Constitutional rights. In his reply brief appellant cites *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971) and *New York Times Co. v. United States*, 403 U.S. 713, 715 (1971) for the proposition that prior restraints on expression carry a heavy constitutional presumption against its constitutional validity. He argues that the condition imposed by the court is

an outright prohibition of the right of free speech. We disagree. The condition is not a prohibition on the right of free speech. Following the principles of modern property law, the trial court properly, within constitutional dictates, limited appellant's right to free speech.

Accordingly, the judgment of the trial court is affirmed.

George T. Ellis
Associate Justice

Judgment rendered and Opinion filed January 17, 1985.

Panel consists of Associate Justices Pressler, Robertson and Ellis.

ORDERS OF THE COURT OF CRIMINAL APPEALS OF TEXAS REFUSING PETITION FOR DISCRETIONARY REVIEW AND DENYING MOTION FOR REHEARING

(February 26, 1986, and April 16, 1986, respectively)

CLERK'S OFFICE
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS

I, THOMAS LOWE, Clerk of the Court of Criminal Appeals of Texas, do hereby certify that in Cause No. 0296-85 styled:

JACK LYNN HOFFART — Appellant

VS.

STATE OF TEXAS — STATE

On March 14, 1985 the Appellant's Petition for Discretionary Review of the judgment of the Court of Appeals

for the Fourteenth Supreme Judicial District of Texas was filed with this Court. On February 26, 1986 the Appellant's Petition for Discretionary Review was Refused and on April 16, 1986 the Appellant's Motion for Rehearing was Denied.

THEREFORE, WITH THE Denial of the Appellant's Motion for Rehearing, this cause was disposed of by this Court on April 16, 1986, the appellant having exhausted all remedies in this, The Court of Criminal Appeals of Texas and the judgment has now become final on the docket of this Court.

WITNESS my hand and seal of said Court, at my office in Austin, Texas, this the 29th. day of April, A.D., 1986.

/s/ THOMAS LOWE, Clerk of the Court
Of Criminal Appeals of Texas

(SEAL)

ORDER OF THE COURT OF APPEALS OVERRULING MOTION FOR REHEARING (JUDGMENT OF THE COURT OF APPEALS INCLUDED IN OPINION OF THE COURT OF APPEALS)

COURT OF APPEALS
14th Supreme Judicial District
1307 San Jacinto, 11th Floor
Houston, Texas 77002

[Other letterhead matters omitted.]

February 7, 1985

Hon. Richard W. Schumude (sic)
P.O. Box 674
Tomball, TX 77375

Hon. Rory C. Flynn
Assistant District Attorney
201 Fannin
Houston, TX 77002

RE: CASE NO. 14-84-00361-CR

TRIAL COURT CASE NO. 753,985

STYLE: Hoffart, Jack Lynn
V: The State of Texas

Gentlemen:

Please be advised that, on this date, the Court OVERRULED appellant's motion for rehearing in the above cause.

Respectfully yours,
MARY JANE SMART, CLERK
By /s/ Charlene Mitchell
Deputy

Hon. Ray Hardy
District Clerk, Harris Co.
301 San Jacinto
Houston, TX 77002

THE STATE OF TEXAS
COUNTY OF HARRIS

I, MARY JANE SMART, Clerk of the Court of Appeals, Fourteenth Supreme Judicial District of the State of Texas, at Houston, do hereby certify that the preceding eight page(s) contain a true and correct copy of Court's opinion rendered January 17, 1985 and order overruling appellant's motion for rehearing filed February 7, 1985 in Cause No. 14-84-361-CR.

JACK LYNN HOFFART, Appellant

VS.

THE STATE OF TEXAS, Appellee

from Harris County, and now do file in my office.

TO CERTIFY WHICH, I hereunto set my hand and affix the Seal of said Court of Appeals, at Houston this the 22nd day of May, 1986.

(SEAL) MARY JANE SMART Clerk

By /s/ Debra Duffield Deputy